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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 830

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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THE SEMINOLE NATION,

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vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Seminole Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on May 5, 1941.

Opinion Below.

The opinion of the Court of Claims is not yet reported (R. 6-9).

Jurisdiction.

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9). Motion for a new trial was overruled on October 6, 1941 (R. 10). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 299, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
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> * * * * * * *
>
> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation * * *"

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides in part as follows:

> "The Court of Claims is hereby directed to consider and to offset against any amount found due to said tribe or band all *sums* spent gratuitously by the United States for the benefit of said tribe or band * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence

heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended. * * *"

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that

there is a failure to make any finding of fact on a material issue."

Questions Presented.

The questions presented are as follows:

1. Whether the Seminole Nation is entitled to recover just compensation for 10,351.82 acres of its lands, held by it in fee simple, which were inadvertently excluded from its domain by an erroneous survey made by an officer of the United States and subsequently patented by the administrative officers of respondent to white settlers and other Indians—which patents were confirmed by the failure of the United States to cancel them after a full knowledge of said errors.

2. Whether fee simple title to the 200,000 acres of land, described in the Treaty of March 21, 1866, passed by grant *in praesenti* to the Seminoles, by the terms of said Treaty of March 21, 1866, 14 Stat. 755.

3. Whether an erroneous survey would divest the Seminole Nation of title to its lands granted in fee simple by said Treaty of March 21, 1866.

4. Whether by the rules of this Court or by the rules of the Court of Claims or by statute, the Court of Claims is required to make findings of fact on pertinent and material issues of fact.

(a) Whether in the findings of the lower court the recital of an allegation in the pleadings on a material issue of fact complies with the rules of this court and the statutes requiring the lower court to make findings of fact.

(b) Whether the statement in the Court of Claims Findings of Fact that "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54

acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others," is or can be considered as a proper finding of fact on the material issues of (1) the amount of the acreage erroneously excluded by the survey; (2) how the plaintiff became dispossessed; (3) the manner in which plaintiff's lands were taken; (4) by whom plaintiff's lands were taken; (5) the date of the taking; and (6) by what method plaintiff's lands were granted.

5. Whether an item of gratuity offset, which the Court of Claims has allowed the United States in one case, can later be used another time and in a subsequent case to defeat the claim of petitioner in the subsequent case.

In other words, is the United States entitled to have more than one allowance for the same item of gratuity offset?

6. Whether the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which authorizes the Court of Claims to consider and offset "*sums* expended gratuitously by the United States for the *benefit*" of an Indian tribe, permits the court to use lands rather than "*sums*" as a gratuity offset.

Statement of the Case.

The material facts of this case are set forth as follows:

By the terms of the Treaty of March 21, 1866, 14 Stat. 755, the United States granted to the Seminole Nation a national domain of 200,000 acres of land. Art. III of said Treaty provides in part as follows:

> "The United States having obtained by grant of the Creek Nation the westerly half of their lands, *hereby grant to the Seminole Nation* the portion thereof hereafter described, which shall constitute the national do-

main of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian River where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866 (June 14, 1866), following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of One Hundred Thousand ($100,000) Dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." (Italics ours.)

The Creek "dividing line" under the Creek Treaty of June 14, 1866, 14 Stat. 785, was established by Frederick W. Bardwell in 1871, and was approved by the Secretary of the Interior on February 5, 1872. This Bardwell line became the east boundary of the new Seminole National domain granted to the Seminole Nation by the United States under said Seminole Treaty of March 21, 1866, and constituted the base from which the true west line of the Seminole 200,000 acre treaty tract was to have been established (R. 7).

In 1871, and within two months after the survey and running of the Creek "dividing line" by Frederick W. Bardwell, the respondent employed one Nathaniel Robbins to run the western boundary line of this 200,000 acre tract which the respondent had granted to the Seminole Nation under the said Treaty of March 21, 1866, 14 Stat. 755. This survey was completed in 1871 and was approved by the Secretary of the Interior on February 5, 1872. Ac-

cording to *Robbins' calculations* the number of acres included between the Canadian River on the south, the north fork of the Canadian River on the north, the Bardwell line on the east and the Robbins' line on the west, was 200,000.03 (R. 7).

By Treaty of February 27, 1867, 15 Stat. 531, between the Pottawatomie Indians and the United States, said Pottawatomies were authorized to select a suitable location for the exclusive use and occupancy of said tribe in Indian Territory, said location to be made "without interfering with the locations made for other Indians."[1] Accordingly said Pottawatomie Indians selected lands immediately west of and adjoining said Seminole National Domain.

In 1881 the Seminole Nation acquired a tract of 175,000 acres of land east of and contiguous to the 200,000 acre treaty tract. The history of the acquisition of said 175,000 acre tract is hereinafter set forth. This tract, together with the 200,000 acres acquired by said Treaty of March 21, 1866, should have constituted a domain of 375,000 acres.

In 1897 and 1898 the combined Seminole domain was sectionalized by the United States Geological Survey and it

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[1] In its Finding 4 the lower court stated that the Pottawatomies were "granted" lands immediately west of the Seminole Domain. Let us point out to the Court that no "grant" was made to the Pottawatomie tribe. The Pottawatomie Treaty of February 27, 1867, 15 Stat. 531 (Art. I) contains no such grant, but merely authorizes the Pottawatomie Indians to locate in Indian Territory, and

> "To select, if possible, a suitable location for their people without interfering with the locations made for other Indians."

In the letter of Acting Commissioner of Indian Affairs to the Secretary of the Interior dated May 17, 1887 (Sen. Doc. No. 64, 51st Congress, 2nd Sess., p. 3) it is stated:

> "March 16, 1872, the Secretary of the Interior decided that the land selected by the Pottawatomies under the Treaty of 1867 could not be conveyed by Patent to the Nation, for the reason that as all the members of the tribe had become citizens the nation had become extinct."

then, for the first time, became apparent that the combined areas of the Seminole tracts were deficient to the extent of some 9,135.57 acres. On January 17, 1900, the Principal Chief of the Seminole Nation wrote to the Commissioner of Indian Affairs as follows (R. 19).

> "By an error made by the United States Surveyors in establishing the boundary of said tracts, there was, as a matter of fact, set apart to the Seminole Nation only 365,864.43 acres, leaving a deficit of 9,135.57 acres."

In said letter the Principal Chief also requested the Respondent to correct the error and give the Seminole Nation the lands to which it was entitled (R. 19).

On February 5, 1900, the Commissioner of Indian Affairs, in his communication to the Secretary of the Interior, reviewed the history of this matter and stated in part as follows (R. 20):

> "The recent surveys in the Indian Territory made by the Geological Survey show that the total area included in the Seminole Nation is 365,864.43 acres, as stated by Governor Brown."

The errors of Robbins in surveying and establishing the west boundary of the Seminole 200,000 acre tract was further recognized by the officials of the respondent. On October 16, 1900, Acting Secretary F. L. Campbell wrote to the Commission to the Five Civilized Tribes, and after reviewing the facts, stated in part as follows (R. 22):

> "* * * but said surveys appear to indicate several hundred acres in excess of 175,000 acres, which shows that if error existed in the total area its cause will be found in the 'crooked west boundary' of the 200,000 acres west of the 'dividing line' or in the incorrect location of the 'dividing line' itself * * *."

The west line of the Seminole 200,000 acre tract, as surveyed and established by Nathaniel Robbins in 1871, was

in error; and the said tract of 200,000 acres contained an area of 189,648.18 acres (R. 16). As a consequence of this error, 10,351.82 acres of Seminole National domain granted to the Seminole Nation in said Treaty of March 21, 1866, had been erroneously and inadvertently excluded from the Seminole National Domain, and included in the Pottawatomie reservation located immediately west of said Seminole domain, and the United States had allotted and patented said 10,351.82 acres either to Pottawatomie Indians or white settlers pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, and turned the purchase price into the United States Treasury as public money. Thereafter said Seminole lands have been held by the grantees adversely to the petitioner (R. 16, 7).

Although as early as 1900 the respondent had knowledge or ample means of knowledge of these errors made by its administrative officers, yet respondent took no steps to correct them and by its inaction it confirmed said erroneous disposals and patents, as of the date of their issuance. Therefore, we submit that the petitioner is now entitled to just compensation for the taking of said lands.

In the lower court the respondent, defendant below, took issue with us on the facts, contending that the area of the Seminole tracts was computed from an erroneous location of the Creek "dividing", or Bardwell line, and relied upon the Bardwell field note record, and certain distances set forth therein.

The petitioner, plaintiff below, relied upon the location of the Bardwell line as identified, relocated on the ground and reestablished by H. C. F. Haekbusch, a surveyor of the General Land Office, in 1888 (R. 15).

While the case was pending before the lower court the Department of Justice, with the consent of petitioner's counsel, requested the General Land Office to make a field

examination with respect to the true location of the Creek "dividing" line, as established by Bardwell in 1871, and the lines of certain later surveys that were related thereto in connection with the controversy involved in this case (R. 10-11).

This investigation was made by Arthur D. Kidder, District Cadastral Engineer, of the General Land Office.[2]

The report of Mr. Kidder, dated March 8, 1941, shows conclusively that the Robbins survey of the west boundary of the Seminole 200,000 acre treaty tract and his computation of the area were in error. In discussing this survey, Mr. Kidder states (R. 12):

> "It appears very evident, after a thorough field examination, that Robbins began his survey at a point that was not in agreement with the dividing line, and that the area which is actually included within the tract boundaries is much less than 200,000 acres.
>
> "There are several factors that contribute to the discrepancy in area: (1) The beginning point was east of the dividing line; (2) The Robbins meander courses are not correct as to their direction from true north; and (3) the length of the Bardwell east boundary, from north to south, is very much less than the distance that is given in the field notes."

Kidder further states (R. 14):

> "The actual length of the west boundary of the 200,000 acre tract, between the rivers, as taken from

[2] Mr. Kidder has had some forty years experience in this field of engineering work, and was Commissioner of this Court to settle boundary disputes in *Oklahoma* v. *Texas*, 272 U. S. 21, 273 U. S. 93, and *New Mexico* v. *Colorado*, 267 U. S. 30, 268 U. S. 108. Both parties were indeed fortunate to have had the benefit of the wide experience of Mr. Kidder in straightening out these old surveys of the Seminole lands. Strange to say, however, after the Kidder report was submitted to the General Land Office, although the Government requested this field examination, its counsel refused to file it as evidence in the case, and it became the duty of petitioner to do so.

the township plats, is 28.86 chains (1905 feet) *greater* than the Robbins field note record distance.

"As a consequence of the above known discrepancies it is impracticable to adjust the Robbins lines to secure a closure for the computation of the enclosed area. The showing is made that the tract contains 200,000 acres, but the calculation cannot be verified. It is necessary to abandon the Robbins record and take the directions and lengths of lines as these are found on the ground;"

The report also sets forth a full account of the survey of the retracement of the Creek "dividing" line, or Bardwell line, made in 1888 by H. C. F. Hackbusch, a surveyor of the General Land Office, and sets forth the fact that Hackbusch found some of the old corners set by Bardwell on the ground, and ran a line retracing the Bardwell line, through these identified corners (R. 14-16). The area in the Seminole 200,000 acre tract between the Bardwell line as retraced by Hackbusch, and the Robbins west line, and the north and south Canadian Rivers, was 189,648.18 acres, or 10,351.82 acres short of the 200,000 acres granted to the Seminoles by the Treaty of March 21, 1866 (R. 16).

Even though the lower court had this evidence before it yet it failed to make a definite finding as to the Seminole acreage erroneously excluded from the Seminole 200,000 acre tract by the Robbins survey, and included in the Pottawatomie Reservation.

In its Finding 4 the lower court said (R. 7):

"It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others."

The lower court failed to find as a material fact that there was an actual deficit of 10,351.82 acres in said tract, as

shown by the Kidder report. This seemed strange to us in view of the holding of the lower court in *The Creek Nation* v. *United States*, 93 C. Cls. 561 (decided on the same day the case at bar was decided), settling this identical question that the *true Bardwell line location* was that which was reestablished by Hackbusch in 1888, and that the Hackbusch retracement line was the point from which to make the computation of the acreage in that case.

Specification of Errors to be Urged.

The lower court erred:

1. In failing to find from the evidence submitted the amount of acreage of petitioner's lands excluded by the erroneous Robbins survey of the west boundary and thereafter patented to white settlers and individual Pottawatomie Indians.

2. In failing to make definite findings of fact, as to when the respondent took plaintiff's lands, and the amount of petitioner's lands taken by the respondent.

3. In failing to find and hold that the petitioner was divested of its fee simple title to 10,351.82 acres, which were part of a definitely described 200,000 acre tract, acquired by grant *in praesenti* in the Treaty of March 21, 1866, when patents thereto were issued by respondent pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026.

4. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it had jurisdiction to offset land against land, without first definitely determining the amount due petitioner for its land taken by respondent, or the actual amount of the gratuity element in the land claimed by respondent as an offset.

5. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it could use land as an offset, rather

than the actual "sums" expended for the land claimed by respondent as an offset.

6. In finding and holding that the 175,000 acre tract, which respondent turned over to the Seminole Nation, constituted an element of gratuity.

7. In failing to find definite values of the respective elements of "gratuity" and "reparation" in connection with the 175,000 acre offset claim of respondent.

8. In failing and refusing to allow just compensation for 10,351.82 acres of its lands, held by it in fee simple, and taken from petitioner by patents inadvertently issued thereon, pursuant to said Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, which patents were confirmed by the United States through its failure to place the Seminole Nation in possession of its lands after a full knowledge of the facts.

9. In holding that, after having allowed respondent an offset for the 175,000 acre tract in case No. L-51, *The Seminole Nation* v. *United States*, 93 Ct. Clms. 500, 525, it could again and for a second time allow the respondent another offset, in this case, for the same tract of land.

Reasons for Granting the Writ.

1. The lower court failed to follow the plain rules laid down in the decision of this Court in the case of *United States* v. *Creek Nation*, 295 U. S. 103.

2. The lower court has misconstrued and misapplied the Act of August 12, 1935, c. 508, 49 Stat. 571, 596. This act authorizes the court to consider and offset "*sums*" expended gratuitously by the United States for the "benefit" of an Indian tribe. Thus, this act permits the offset of money only. As can be noticed from a reading of the decision of the lower court, the *sums* paid by the respondent

for the land claimed by it as an offset were not offset against petitioner's claim; but, on the other hand, the lower court, in this case, used other land itself as an offset to defeat the just claim of petitioner for just compensation for 10,351.82 acres of its lands appropriated by respondent, without determining the definite amount due petitioner for its lands, or the amount due respondent as an offset.

3. The decision of the lower court in this case was not unanimous. Mr. Chief Justice Whaley dissented.

4. The lower court failed to make findings of fact on the material issues in the case.

5. In this case the lower court again allowed the respondent a purported gratuity offset which it had previously allowed respondent in a prior case. In case No. L-51, *The Seminole Nation* vs. *United States*, reported in 93 C. Clms. 500, and which is now pending for decision in this Court, as case No. 348, the respondent was allowed an offset for the very item used by the lower court to defeat petitioner's claim in this case.

6. Because of the above errors in the decision of the lower court, petitioner has failed to receive for the lands owned by it in fee simple, and appropriated by the respondent, the just compensation guaranteed it by the Fifth Amendment to the Constitution.

BRIEF.

The lower court failed to apply to this case the rule laid down by this Court in *United States* vs. *Creek Nation*, 295 U. S. 103. In that case this Court held that where the lands of an Indian tribe are held by it in *fee simple title*, an erroneous survey excluding lands from the tribal domain and including them within the lands of another tribe, would not be a taking of these lands; but that when erroneous patents were issued by the administrative officers of the United States to homesteaders or to Indians of another tribe, and no action was taken by the United States to cancel said patents after a full knowledge of the errors, said inaction confirmed said patents as of the dates of their issuance, and a taking was created for which just compensation was due the tribe from the United States under the Fifth Amendment to the Constitution of the United States.

The Seminole Nation in the case at bar had acquired by purchase the 10,331.82 acres involved in this suit; and by said Treaty of March 21, 1866, the United States granted *in praesenti* to the Seminole Nation the fee simple title to these lands. Therefore, the *title* of the Seminoles was founded upon this Treaty, and could be divested only by voluntary cession or by a taking by the United States. See *New York Indians* v. *United States*, 170 U. S. 1.

By an erroneous survey made by Nathaniel Robbins in 1871, 10,351.82 acres of said lands were inadvertently excluded from the Seminole domain and included in the lands of another Indian tribe; and were thereafter patented to Pottawatomie Indians or white settlers under the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, without the discovery of the error.

In 1896 and 1897, when the Seminole lands were sectionalized by the United States Geological Survey, the

errors became apparent. However, the erroneous patents already issued were permitted to stand, and further erroneous patents were thereafter issued, and no steps were taken by the United States to correct said errors, or to place the Seminole Nation in possession of its lands.

The facts are similar to those in the *Creek* case, and clearly the lower court erred in failing to apply the rule set forth by this Court in that case.

The sole reason for the failure of the lower court to apply the rule in the *Creek* case was that in view of the fact that the Seminole Nation had been given another tract of 175,000 acres of lands, it was not entitled to just compensation for said 10,351.82 acres as of the dates of the issuance of patents.

The lower court said (R. 8-9):

> "Plainly it cannot recover. Although there may have been this deficit, more or less, in the 200,000 acre tract the defendant was obligated to set apart for plaintiff, the plaintiff was compensated therefor fifteenfold by the addition to the reservation of 175,000 or more additional acres immediately to the east. The plaintiff was entitled to receive from the defendant only 200,000 acres, but it has in fact received at least 360,000 acres and, therefore, cannot complain that there was a small deficit in the original 200,000 acre tract agreed to be set apart to it."

In this holding the lower court erred in three respects:

1. The acquisition of the 175,000 acre tract by the Seminole Nation did not involve an element of gratuity, but constituted an element of reparation for the Government's own error.

2. That the 175,000 acres cannot be offset as land under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which permits *sums* only to be offset against an Indian tribe.

3. That the lower court has already offset the amount paid by the United States for this tract in *The Seminole Nation* v. *United States*, 93 Ct. Cls. 500, and it cannot properly use the same item again to defeat the present claim of petitioner.

Petitioner's claim, as heretofore set forth, was clear, definite and certain; but the lower court instead of determining the question of respondent's liability on petitioner's claim and then offsetting any "sums" which the respondent may have had, mixed up petitioner's claim with an alleged claim of respondent for a purported gratuity offset on another and distinct tract of land of 175,000 acres. The acquisition by the Seminole Nation of said 175,000 acre tract depended upon an entirely different consideration, and had a separate and distinct history.

In order that the court may see how petitioner's claim was confused with this transaction, the history of said 175,000 acre tract is set forth as follows:

In the fall of 1866 the Seminoles were removed by the United States to what was believed to be their new national domain, and were encouraged by the United States to make immediate and permanent improvements thereon, and they thereafter occupied said lands. The officers of the Government assured them that they would be protected in their improvements (Finding 3, R. 7; Sen. Ex. Doc. No. 75, 47th Cong., 1 Sess., pp. 5; 7; Sen. Ex. Doc. No. 126, 51 Cong., 1 Sess., pp. 2, 3, 6, 9; R. 17-19).

After the Creek "dividing line" had been run, it was discovered that the Seminoles had, by error, been settled *in part* on lands retained by the Creeks. In the meantime the Seminoles had made *substantial* improvements on this land, and at that time the improvements which they had made were more valuable than the lands on which they were located. To remedy this situation, and to fulfill its

promises to the Seminoles—to protect them in their improvements—the respondent, on February 14, 1881, purchased from the Creek Nation 175,000 acres of land immediately east of the Creek "dividing line", as run by Bardwell, and added same to the original Seminole 200,000 acre tract without cost to the Seminole Nation. By Act of August 5, 1882, c. 390, 22 Stat. 257, 265, the amount of $175,000 was duly paid the Creek Nation for these lands. (*Creek Nation* vs. *United States*, 93 C. Cls. 561, 563; Senate Ex. Doc. No. 126, 51st Cong. pp. 2, 3, 6, 9; Sen. Ex. Doc. No. 75, 47th Congress, 1st Session, p. 6; Findings 5, R. 7-8; Rept. Comr. Ind. Aff., 1872, pp. 36-37, 241; R. 17-19).

In reporting on this purchase, and submitting a draft of the provision for inclusion in an appropriation bill Acting Commissioner of Indian Affairs, Thomas M. Nichol, wrote the Secretary on February 18, 1881, as follows (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., Cong. Ser. 1989, p. 7):

> "As shown in the foregoing the homeless condition of the Seminoles and their unwelcome occupation of lands belonging to another tribe, as well as the necessity of settling them somewhere, as soon as possible in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposed to be the land that would enure to them, when the 'dividing line' should be surveyed, but which upon the correct survey of that line was found to be included in the Creek reserve. That they were thus erroneously located is, under the circumstances, not to be wondered at, but certainly it was through no fault of the Seminoles and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents

> per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

Thus, in refusing recovery in this case the lower court mixes up lands of the two entirely separate and distinct Seminole tracts, and disregards the fact that the 175,000 acre tract was given to the Seminoles to make good the error of the United States in settling them on the wrong land, and to make good its promise to protect the Seminoles in their improvements. Thus this transaction involved no element of gratuity but constituted an element of reparation in that had the Government moved the Seminoles off the Creek lands and paid them for their improvements, it would have cost the Government more to rectify its error than to buy the land and give it to the Seminoles.

The Lower Court Has No Jurisdiction to Offset Lands Against Lands.

The lower court has no jurisdiction to offset lands against lands, as it did in this case. The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, permits "sums" only to be offset as gratuities. While the lower court's decision recognized this fact, yet it goes on to state as follows:

> "* * * Therefore, if the plaintiff be entitled to recover for any deficit in the 200,000 acre tract, the defendant would be entitled to an offset of the value of the acreage given them gratuitously. This value is far in excess of the value of whatever deficit there may have been."

Here again the lower court refuses to recognize the fact that the 175,000 acre tract was an element of reparation, and that it was not an element of gratuity. Furthermore,

it states that the value of the 175,000 acre tract "is far in excess of the value of whatever deficit there may have been." This conclusion is not supported by any finding of the value of the 10,351.82 acre deficit, as of the dates of the patents issued—the date of the taking by the United States.

Thus, without endeavoring to establish and find the values of the acreage involved in this suit as of the date of taking, the lower court summarily jumps to the conclusion that the 175,000 acre tract was of more value than the smaller acreage claimed, and without considering that the lands involved in the claim were not a part of said 175,000 acre tract, or that the date of taking was at a later date than the transaction with respect to the 175,000 acre tract.

The United States Is Entitled to Credit Just Once for an Item of Offset.

By the use of this 175,000 acre tract as a gratuity offset against petitioner, the lower court has used this same item of offset twice: in this case, and in the *Seminole Nation* v. *United States*, 93 C. Cls. 500. In said *Seminole* case the lower court allowed the United States a gratuity offset in the amount of $165,847.17 for said 175,000 acre tract. The right of the defendant to such an offset in that case is challenged by the petitioner in case No. 348 now pending before this Court. Notwithstanding this allowance, the lower court again uses the same item of offset in the case at bar, to defeat the claim of the petitioner for just compensation for the value of the 10,351.82 acres involved in this case. Thus we have an anomalous situation of the lower court's allowing the same item of offset twice, and in two different amounts and in two different ways. Clearly the lower court erred in again using this item as an offset in the case at bar.

The Lower Court Failed to Find the Material Facts.

Let us point out to the Court that the lower court failed to find the facts material to the issues involved in this case. For example, in Finding 4 the lower court stated (R. 7):

> "It is alleged that when the boundary of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff was dispossessed of said acreage and the same has been granted and is now held adversely by others."

We submit that this statement is not a proper finding as to whether or not the said 10,351.82 acres of Seminole Land were excluded from its domain and included within the Pottawatomie Reservation. This is merely a statement of the pleading and clearly is not a proper finding of fact. In *United States* v. *Henry*, 17 Wall. 405, 408, this Court held that a statement of the Court of Claims that the mustering officer "'alleged" that a company was below the minimum strength was not a proper finding of fact. We submit that the lower court should have found the fact with respect to the following material issues of fact:

1. Whether petitioner received fee simple title, *in praesenti*, to the 200,000 acres described in the Treaty of March 21, 1866, 14 Stat. 755.

2. The amount of acreage actually excluded from petitioner's 200,000 acre tract by the erroneous Robbins survey of the west boundary line in 1871.

3. The time when the errors of the Robbins survey of the 200,000 acre tract first became apparent to the officials of the respondent.

4. The time when the Seminole Nation first demanded the lands to which they were entitled, and requested respondent to correct the error.

5. The amount of acreage taken from petitioner and patented to white settlers and individual Pottawatomie Indians.

6. The amount, if any, of the element of gratuity present in the 175,000 acre tract claimed by the respondent as an offset.

7. The amount of the element of reparation present in the 175,000 acre tract.

8. The value of petitioner's 10,351.82 acres at the time of the taking.

From a study of the case of *United States* v. *Creek Nation*, 295 U. S. 103, it will readily be seen that this Court considered these facts material to the proper determination of that case. A mere glance at the lower court's Findings in this case (R. 6-8) shows the complete absence of the finding of these necessary facts.

Conclusion.

From the facts herein set forth, which are supported by the record before this Court, it is evident that 10,351.82 acres granted in fee simple to the Seminole Nation by the Treaty of March 21, 1866, because of an erroneous survey, were excluded from the Seminole domain and included in the Pottawatomie Reservation, and were thereafter erroneously patented to Pottawatomie Indians and white settlers; that after a knowledge of the facts the United States, the guardian of petitioner, took no action to place the Seminole Nation in possession of its lands.

We submit that under these circumstances the lower court should have applied the rule laid down by this Court in *United States* v. *Creek Nation*, 295 U. S. 103, and should have awarded the Seminole Nation just compensation for its lands thus taken.

For the reasons above set forth, we respectfully request that the Court grant a writ of certiorari to the petitioner in this case.

Respectfully submitted,

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